No. 5982

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

ROSE M. ALLEN,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

CHARLES C. CAVANAH, *District Judge*

Appellant's Opening Brief

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GATEWAY PRINTING COMPANY, SEATTLE

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STATEMENT OF THE CASE

This is an action to recover on an insurance policy which was issued by the Appellant Company on September 20, 1924, to C. L. and R. A. Reynolds and insured buildings upon property situated in the town of Filer, Idaho, (Tr. 14). To it was attached a form entitled, "Mortgage Clause with Full Contribution," (Tr. 29), by the provisions of which the loss or damage under the policy was made payable to Rose M. Allen as Mortgagee, (Tr. 29). The building insured was destroyed by fire on August 29, 1928. The amount of

the policy was $10,000 and the record discloses that at the time of the fire, C. L. and R. A. Reynolds were indebted to Rose M. Allen in an amount in excess of that sum.

Proof of loss was filed on behalf of the Mortgagee alone, (Tr. 199) and she is the sole plaintiff. A history of the issuance of the policy is essential to an understanding of the points raised by the various Assignments of Error.

Prior to 1919, the plaintiff's husband was engaged in the hardware business in Filer, Idaho, together with the Reynolds brothers. He died in that year and in the settlement of the estate, Mrs. Allen sold her interests in the Filer Hardware Company to the Reynolds brothers, and accepted in payment therefor promissory notes signed by Richard A. Reynolds and Charles L. Reynolds and their respective wives. The notes matured at different dates (Plaintiff's Exhibit 6, 7, 8 and 9, Tr. 172-176). The total amount of the notes given was $12,629.73. As security for said notes a mortgage was executed by the Reynolds brothers for the total sum of the notes; was signed by the same parties as were the notes; the mortgage which covers the property described in the insurance policy, was executed June 20, 1919, and is set forth in full in Transcript at page 177. This mortgage does not contain the ordinary provision requiring the mortgagor to keep the property insured, a fact which was admitted by Counsel in open court. (Tr. 219).

Any agreement as to insurance was made by an independent contract and is not evidenced by any written instrument. From 1919 until 1924, the insurance was carried in a company or companies other than the Appellant, and was on a yearly basis, (Tr. 62). The policies were placed in a safe deposit box belonging to Mrs. Allen and in the First National Bank at Filer, Idaho. The selection of the companies and all details with reference to the insurance devolved upon Mr. Reynolds.

In September, 1924, the policy in controversy was written. All negotiations with reference to this policy were conducted by Mr. Reynolds through the Appellant's local agent, Arthur E. Anderson. So far as the record discloses, Mrs. Allen personally did not at any time communicate with the Company or its agent. The first annual premium due September 20, 1925, was paid by the Reynolds brothers (Exhibit 5, Tr. 171) and a renewal certificate was issued August 12, 1925, (Defendant's Exhibit 20, Tr. 201), which by its terms renewed the policy for one year or up to September 20, 1926.

There is a dispute in the testimony as to some of the conversation in connection with the 1926 renewal. Mr. Anderson, the agent who originally secured the policy, had sold his business to Mr. R. F. Graves in May, 1925, and the initial premium was paid to him (Tr. 171). Mr. Graves, Senior, one of the members of the new firm, testified that the business was desirable and that he was anxious to hold it, (Tr. 108). Mr.

Graves, Junior, another member of the firm, testified that he visited Mr. Reynolds at his office to collect the annual premium and to secure a renewal of the policy, (Tr. 89), sometime prior to the expiration date, (Tr. 89). That he again talked to R. A. Reynolds on October 4, 1926, (Tr. 89). That at the time of the first conversation, Mr. Reynolds indicated his intention to transfer the insurance to the Hardware Dealers Mutual. That at the second conversation, Mr. Reynolds surrendered to him the original policy and that Mr. Graves thereupon endorsed on the face of the policy, "Cancelled—Lost to Hardware Dealers Mutual—R. P. Graves—Oct. 4, 1926." That he, in accordance with the usual custom, tore off the face of the policy and mailed it to the Company's Home Office at Seattle. This policy face was produced by the Company from its records and Mr. Becker, the Assistant Secretary, testified that it was the customary practice to mail in only the face in order to save postage, (Tr. 77). Mr. Becker also identified (Defendant's Exhibit 21, Tr. 202) the original record of the Company as to this policy and pointed out that Reason 13, that appeared on that record, indicated that the business had been lost to another company, (Tr. 97).

Mr. Reynolds denied having the policy in his possession and that he had surrendered it to Mr. Graves, but the Defendant produced a bill for the renewal of the policy, mailed to Mr. Reynolds, dated September 21, 1926, (Defendant's Exhibit 22, Tr. 203), upon which he noted: "This policy placed WF—Hdw. Mutual, please cancel, R. A. R." This notation sub-

stantiates the testimony of Mr. Graves and establishes without doubt that the failure to renew the policy was due entirely to Mr. Reynolds.

Mrs. Allen, according to her own testimony, left Idaho in April, 1924, or some five months prior to the issuance of the policy, (Tr. 67). She returned to Filer in June, 1927, remaining there three weeks. The purpose of her visit was to collect delinquent interest on the notes from the Reynolds brothers, (Tr. 70). She went to her safe deposit box but did not observe as to whether or not the insurance policy was in the box, (Tr. 71). Proof of loss was verified by Mrs. Allen on October 11, 1928, (Tr. 199), and mailed by her attorney, Mr. Gillis, to the Home Office of the Company, (Tr. 89). The proof of loss was made in behalf of Mrs. Allen alone.

The complaint was filed December 12, 1928, Rose M. Allen being the only plaintiff. The Defendant demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, (Tr. 32). This demurrer was overruled by the Court, February 11, 1929, (Tr. 33).

This brief statement of the facts, as revealed by the record, emphasizes the following points that bear directly upon the various Assignments of Error:

I.

The mortgage did not require the mortgagor to carry insurance for the benefit of the mortgagee, and the relationship between Mrs. Allen, the plaintiff, and

the Reynolds brothers, the mortgagors, with reference to insurance was created by an independent and separate contract.

II.

Mrs. Allen left Idaho before the issuance of the insurance policy; had no dealings with the defendant company personally and any representations made to her as to the terms and conditions or as to the term of the insurance policy, were made by Mr. Reynolds.

III.

The insurance policy was not terminated by any affirmative act on part of the Defendant or its agent, but solely by the failure of the insured to pay the annual premium and by his surrender of the policy.

IV.

Mrs. Allen returned to Idaho to collect delinquent interest on the notes secured by the mortgage; actually went to the safe deposit box where, according to her testimony, the policy was supposed to be, and made no search for the policy or any inquiries concerning it. This was in 1927 and prior to the fire.

Assignment of Errors

And now comes the defendant, General Insurance Company of America, a corporation, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in the above-entitled cause on July 2nd, 1929, and from the order of the court dated and

signed July 30, 1929, denying defendant's request for a declaration of law "that under the pleadings, contract of insurance, and evidence, plaintiff is not entitled to recover, and the decision and judgment of the court is in favor of the defendant," and from the order of the court dated and signed on September 6, 1929, denying defendant's petition for a new trial, and says that said judgment and orders, and each of them, made and filed by the court in said cause, are erroneous and unjust to this defendant and particularly in this:

1. Because the court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. Because the said judgment is contrary to law.

3. Because the said judgment is contrary to the evidence.

4. The court erred in permitting the witness R. A. Reynolds to answer the following question over defendant's objection:

> "Q. At the time of the execution of the note and mortgage was there any agreement between you and Mrs. Allen in regard to carrying insurance on the property?
>
> A. Yes.
>
> MR. BOTHWELL: I object to that. It is now shown that there was a mortgage, an instrument in writing, and that would be the best evidence.
>
> THE COURT: The mortgage probably contained the condition to the insurance.
>
> MR. GRAHAM: I do not think it contained the

requirement as to the insurance, but at the time the note and mortgage were executed and contemporaneously with it, he agreed to give additional security in the way of insurance.

THE COURT: He may answer.

A. I had an agreement with Mrs. Allen that I would carry $10,000 insurance at all times on the building at least.

Q. This policy was taken out in accordance with that agreement?

A. With the mortgage clause attached to it, yes."

5. The court erred in sustaining objections of plaintiff to questions asked the witness and plaintiff, Rose M. Allen, on cross-examination, as follows:

"Q. You were talking with Mr. Reynolds about collecting interest on the notes?

A. Yes.

Q. Did you say anything to him about insurance at that time?

MR. GRAHAM: She has already answered that.

THE COURT: She said she didn't recall. Sustained.

Q. Well, do I understand by that that you have talked to him about it at that time?

A. No, sir, I did not.

Q. You looked in your box in 1927 to see whether this policy was there?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: Sustained.

Q. Why didn't you inquire from Mr. Reynolds about the policy at that time?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: What is the purpose why she didn't do this? I cannot see the idea unless it is going to lead up to something else. I cannot see where it is competent now as to why she did not do this or do that. She has testified as to what she actually did. I can see how it might be competent. I don't know what you may be leading up to. It might be material under certain circumstances to ask that question. I think I will let her answer the question.

THE COURT: He is asking why you didn't inquire from Mr. Reynolds about this policy in 1927. Any reason why you didn't do it, if you had any?

A. I never thought of asking him.

THE COURT: That other question I think I will allow you to answer that.

MR. BOTHWELL: Will you read the question Mr. Reporter? (Question read by reporter).

Q. Why didn't you look in your box in 1927 to see whether this policy was there?

A. I just never thought of looking, that was all.

Q. You were leaving that matter, the question of insurance to Mr. Reynolds, as I understand it.

A. Yes."

6. The court erred in sustaining plaintiff's objection to the following question asked of the witness R. A. Reynolds on cross-examination on rebuttal.

"Mr. Bothwell: Q. Did you have any hardware in this building when it burned?

A. Yes, we had some hardware but not a great deal.

Q. What hardware did you have?

Mr. Graham: I object to that as not proper examination upon rebuttal.

The Court: Sustained."

7. Because the judgment is not supported by the pleadings.

8. Because under the pleadings, contract of insurance and evidence, the defendant was entitled to a declaration of law as follows: "The court declares the law to be that under the pleadings, contract of insurance and evidence in this case the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

9. Because the evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent, with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellation to the agent of the defendant, and the uncontradicted evidence shows that R. A. Reynolds, the agent of plaintiff, surrendered the policy in question to the defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company.

10. Because the evidence shows without contradiction that plaintiff knew, or could have known, by exercise of ordinary care that her agent, R. A. Reynolds, had not placed the policy in question in her safety deposit box in the First National Bank of Filer, Idaho, and that plaintiff allowed the policy to remain out of the safety deposit box and under the control of her agent, R. A. Reynolds, and thereby placed it within the control of her said agent to surrender the policy for cancellation.

11. Because it is shown by the evidence, without contradiction, that plaintiff had no dealings whatever with defendant except through R. A. Reynolds, and plaintiff having received the benefits of the insurance for the years 1924 and 1925 through the contract of insurance secured by the said R. A. Reynolds, is now estopped from denying that Reynolds was her agent, and was acting within the scope of his authority when he surrendered the policy for cancellation.

12. Because the uncontradicted evidence shows that the immediate cause of cancellation of the policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retained the policy in his possession and thereafter surrendered the policy to defendant's agent, with a statement in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have

known that the policy was not, in fact, in the safety deposit box, and paintiff knew at that time that the mortgagors were in default upon the mortgage and consequently plaintiff is estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent.

13. Because it appears from the evidence, without contradiction, that the policy was cancelled because Reynolds, agent of the plaintiff, failed to place the policy with the First National Bank of Filer, and thereafter notified defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and that plaintiff, by the use of her natural senses, could have known that the policy was not, in fact, in her safety deposit box in the First National Bank of Filer, and plaintiff is therefore estopped from contending that the policy was not canceled with her knowledge and consent.

14. Because the uncontradicted evidence shows that the act of R. A. Reynolds, in notifying the agent of the defendant, that the policy had been replaced with the Hardware Mutual Insurance Company, was not "an act of neglect of the mortgagor," whereby the policy was invalidated within the meaning of the mortgagee clause attached to the policy, but was an act in furtherance of the agreement between plaintiff and R. A. Reynolds, that Reynolds would keep the building insured, select the insurer, pay the premiums, replace the insurance in a company to the mutual advantage of the plaintiff and mortgagors and place

the policy in the First National Bank at Filer, Idaho.

15. Because it is shown by the uncontradicted evidence that prior to the loss, plaintiff ratified the act of R. A. Reynolds in permitting the policy to be cancelled.

16. Because it is shown by the uncontradicted evidence that one of the mortgagors, R. A. Reynolds, was the agent of plaintiff, and that plaintiff's said agent, R. A. Reynolds, notified the defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and plaintiff is chargeable with the knowledge and acts of her agent in the premises.

17. Because it is shown by the uncontradicted evidence that the term of insurance under the policy in question was from 12 o'clock noon, on September 20, 1924, to 12 o'clock noon, September 20, 1925, and from 12 o'clock noon, September 20, 1925, to 12 o'clock noon, September 20, 1926, and that said policy of insurance expired at noon on September 20, 1926, and was not renewed for the year September 20, 1926 to September 20, 1927, and was not in effect on the date of the loss by fire of the building in question.

18. The court erred in overruling defendant's demurrer to plaintiff's complaint.

19. The court erred in ordering judgment entered in favor of plaintiff and against defendant without containing a provision to the effect, "that upon payment of said judgment to the mortgagee the de-

fendant shall, to the extent of such payment, be subrogated to all the rights of the mortgagee, and that the defendant shall receive a full assignment, and transfer of the mortgage and all other securities held by plaintiff" as provided in condition 5 of the mortgage clause attached to the insurance policy in question.

ARGUMENT

We shall discuss Assignment of Error No. XVIII first, said assignment being as follows:

> "The court erred in overruling defendant's demurrer to plaintiff's complaint."

The complaint alleged ownership of the property in R. A. Reynolds and C. L. Reynolds the execution of the insurance policy September 20, 1924, the existence of the mortgage, and the attachment to the policy of the mortgage clause. The failure of the company to give notice of cancellation to the mortgagee, although there is no allegation that the policy had been cancelled as to any party, the making of the proof of loss for the full sum of $10,000.

A copy of the policy was annexed to the complaint, and by reference, made a part thereof, (Tr. 9).

The first clause of the policy, (Tr. 14) recites the payment of the first premium, and with that exception, there is no allegation in the complaint that the premiums provided for in the policy had been paid. The policy provides, (Tr. 14):

> "Amount, $10,000.00; Rate, $1.63; Premium, $130.40. In consideration of the stipulations herein

named and of One Hundred Thirty and 40/100 Dollars First Annual Premium, and by the payment of the then current annual premium to this company, at or before 12 o'clock noon, or before the 20th day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereinafter provided."

Paragraph IV of the Complaint, (Tr. 10), fixes the date of the fire as August 29, 1928. The complaint then on its face shows that the premiums due in September, 1926 and 1927, were delinquent and unpaid. The above provision of the policy clearly makes the payment of the then current premium to the company at or before 12 o'clock noon, on or before September 20, or every year a condition precedent to the continuation of the policy in effect. By the payment of the first annual premium, the policy was made effective for one year, and it was only on the condition that the subsequent yearly payment be made, that the company agreed to insure the property for the full term of five years. The policy as written was for one year with the option to renew, but with no agreement on part of the insured to renew. The company could not have, by suit or otherwise, collected any additional premium from C. L. Reynolds or R. A. Reynolds. It was their privilege to continue the insurance by the payment of the annual premium or to permit it to expire.

In the case of *Millar v. Western Union Life Insurance Company,* 106 Wash. 491, 180 Pac. 489, a life insurance policy was involved. It was what is known as a "20-year payment plan" and provided for an annual premium under the following provision:

> "The advanced payment in cash to the company of an annual premium of $280.85 for the term insurance for one year, ending on the 7th day of October, 1916, and the payment of an equal amount upon said date and yearly thereafter until premiums for 20 full years in all shall have been paid."

The policy contained no specific provision for forfeiture in case of failure of the insured to pay any installment. The first premium was paid. The insured defaulted in the second premium and died within a few days after its due date. Action was brought to recover under the policy on the theory that in the absence of the forfeiture clause, the non-payment of the premium did not affect the forfeiture. The Court, speaking through Justice Mount, said at page 497:

> "We think it is plain from the provisions of the policy hereinbefore quoted, that this contract is one of assurance for a year with the privilege of renewal, but without obligation to renew from year to year thereafter by payment of stated annual premiums. The assured assumed no obligation upon accepting the contract of insurance. He did not promise to carry the insurance for any stated period. He paid the first premium before receiving the policy. If he thereafter chose to pay the premiums each year in advance, the respondent was obligated to carry his insurance and give his beneficiaries the benefits that the policy afforded,

but the assured was free to withdraw or to abandon the contract whenever he chose and the respondent could not compel him to continue the contract relations longer than he chose or to pay any premium if he did not wish to do so. There is here, no entire contract of insurance for life, because the insured did not agree to carry the policy for life or for any other term beyond the first year. He merely purchased the option to take and carry it if, and as long, as he chose to do so. Under the terms of the policy, it was a term policy for the first year and automatically terminated at that time unless the insured sought to keep it alive by paying the second premium."

The court quotes with approval from *Boke v. New York Life Insurance Company*, 192 Mo. App. 383, 181 S. W. 1047:

> "An argument is made that because the policy is stipulated to be incontestible and there is no expressed provision of forfeiture therein, such policy continued in force whether premiums were paid or not and without regard to the non-forfeiture laws in this state, and that defendant's only right is to deduct the unpaid loan and premiums from the amount of the policy. The case was not prosecuted or tried on any such theory, and besides, where as here the payment of the amount of the policy is conditioned on the payment of premiums when due, then such payments become conditions precedent and the stipulation of incontestibility does not apply to failure to pay premiums."

Brady v. Northwestern Insurance Company, 11 Mich. 443, is one of the oldest cases we have found on the subject. It has been frequently cited in the later cases. The policy in that case provided:

> "This insurance may be continued for such fur-

> ther time as shall be agreed upon. The premium thereon being paid and endorsed on this policy and a receipt given for the same."

The policy was issued in 1856 and was renewed until 1861. After the issuance of the policy, ordinances had been passed forbidding the repair of wooden buildings in certain districts. The obligation of the policy was to repair. This the company offered to do. The plaintiff contended that in view of the ordinance, the company could not limit its liability to repair but should pay the damage suffered. The court said:

> "The question now presented is whether the liability of the defendant is under the promise of 1856 or that of 1861. In other words, was the undertaking of 1856 made a continuous undertaking to be construed by the laws and ordinances as they existed in 1856 solely, or by the renewal were the parties bound by the laws and ordinances existing at the time of the renewal? We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party and a renewal promise by the other, and an obligation revived or continued under such circumstances is an original obligation. It must be asked for by the one and may be assumed or refused by the other, and the policy which is in evidence is therefore continued by the positive act of both parties."

A similar provision was under consideration in *Maryland Casualty Company v. First National Bank*,

246 Federal 899. In that case a bond had been issued as of January 10, 1914, and by the payment of renewal premiums, continued to January 10, 1915. In an opinion written by Judge Walker of the Circuit Court, it was said:

> "That contract is what is known in the insurance business as a term policy, under which the insurance contracted for covers only such losses occurring before the expiration of its stated term. Further action of the parties, having the effect of creating a new contract, was required to make the defendant liable for any loss or losses occurring after January 10, 1915."

In *Proctor Coal Company v. United States Fidelity and Casualty Company*, 124 Federal 427, the following is found:

> "I think the contention of counsel for the defendant that these renewals are separate and distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or any subsequent renewals. The language referred to is this: 'Make good and reimburse to the employer, all and any pecuniary loss sustained by the employer, etc., occurring during the continuance of the bond or any renewal thereof.' I am unable to agree with the argument of plaintiff as to the proper construction to be placed on this language * * *. I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the orginal bond and the two renewals. The correct view seems to be that each renewal is a separate and distinct contract and such, I think, is the effect of the authorities on the subject."

In *DeJennette v. Fidelity Casualty Company,* 98 Ky. 558, 33 S. W. 829, we find:

> "A renewal of the policy constitutes a separate and distinct contract for the period of time covered by such renewal."

Insurance Company v. Walsh, 54 Ill. 164, 5 AM-REC 115, holds:

> "A renewal of a policy is in effect a new contract of assurance and unless otherwise expressed, on the same terms and conditions as were contained in the original policy."

Under these decisions, the failure of the plaintiff to allege the payment of the annual premium was fatal. The policy of insurance expired on September 20, 1925, unless renewed and continued by the payment of the annual premium.

In a decision by this court in the case of *Kentucky Vermillion M. & M. Company v. Norwich Union,* 146 Federal 701, Judge Hawley, speaking for the court said:

> "Under the terms of the policy, if the property remained idle for 'more than thirty days at one time', the policy ceased and terminated. It became void and of no binding force and effect unless the insured gave notice to the company and obtained permission to leave it idle for a longer time by having such time endorsed on the policy. Terms of warranty are conditions precedent to the right of recovery and must always, if not waived or forfeited, be complied with by the assured."

Here, the payment of the renewal premium was a condition precedent to the right of recovery and the

plaintiff's failure to allege such payment in the complaint made it vulnerable to demurrer on the ground of insufficiency.

The plaintiff in her complaint sought to avoid the penalty for non-payment of the premium by the provisions of the mortgagee clause. The sections of that clause pertinent to the present discussion are:

> 1. "Subject to all the terms and conditions hereinafter set forth in this rider, this insurance as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, * * *.
>
> 2. In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same."

In an endeavor to avail herself of these provisions, the plaintiff alleged in her complaint and in Paragraph VIII that she had received no notice of cancellation; that she at all times stood ready to pay on demand any premium, but that no such demand was made, (Tr. 12).

The first guarantee that the interests of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, has no bearing on the situation presented in this case. The mortgagor was not guilty under the allegations of the complaint, of any act or neglect which invalidated the policy in any particular. So far as the complaint is concerned, the Reynolds brothers complied with every provision of the insurance contract. Paragraph I of the terms and conditions

of the policy, (Tr. 17), declares that the policy shall be void in certain contingencies. The mortgagor was not alleged to have committed any act therein prohibited and in fact, there is no allegation anywhere in the complaint that the policy was invalid. Neither is any neglect charged to the mortgagors. The policy imposes certain duties upon them and there is no allegation that they failed in any particular to fulfill such duties.

The act or neglect of the mortgagor can apply only to the doing of an act prohibited by the policy or the failure to perform a duty imposed by its terms for these are the only grounds upon which the policy may be invalidated. It will be urged that the mortgagor neglected to renew the policy by not paying the annual premium, but this is not alleged in the complaint and we have pointed out that the policy did not obligate the mortgagors to renew. That was optional with them. If they desired to allow the policy to lapse or to place the business elsewhere, such was their privilege and by so doing they did not violate any provision of the insurance contract. There may have been an obligation on part of the mortgagor to keep the property insured. It was created by some other agreement to which the appellant was not a party and which was separate and distinct from the insurance contract. If the Reynolds brothers failed in this obligation, the mortgagee's remedy is against them, not against the appellant. They were not required under the policy to pay anything but the initial premium. In failing to renew the contract, they did

not neglect to do anything required of them by the policy.

Reliance will be placed also upon condition No. 1 of the mortgage clause which provides: Condition One—

> "In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same."

There was no premium due. There was no sum that the mortgagor was obligated to pay. Premium due must mean a premium that can be collected by civil action. In the ordinary policy, the consideration is the payment of a definite premium. There is a distinct liability to pay under such circumstances, and the mortgagee would clearly be entitled to a demand of payment before cancellation, but here there is no agreement to pay any subsequent premium. There is a privilege of renewal and if this is not taken advantage of, the policy simply expires and terminates.

There is a wide difference between the expiration of a policy and its cancellation by an affirmative act on part of the company. We know of no rule of law or equity that imposes upon an insurance company the duty of informing a policyholder of the date of expiration of his policy. There is no provision in the policy requiring it and the policyholder is charged with the duty of protecting himself in this regard.

In *Thompson v. Insurance Company*, 104 U. S. 252, 26 L. Ed. 765, the policy was for life in consideration of the annual premium payable on or before a fixed date.

The assured being unable to pay the premium one year, gave his note, which was not paid on maturity. It was held that failure to pay the note was fatal to recovery. The court said:

> "The law, however, has not changed, and if a forfeiture is provided for in case of non-payment at the date, the court cannot grant relief against it. The insurer may waive it or may by his conduct lose his right to enforce it, but that is all."

The court further said, p. 258:

> "The assured knew, was bound to know, when his premium became due."

and at page 260, we find:

> "But the fatal objection to the entire case set up by the plaintiff is that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed if payment had been tendered within the limited period of such indulgence, but this was never done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied upon had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly upon a particular day is a different thing from an excuse for not paying at all."

Condition III of the Mortgage Clause is:

> "This company reserves the right to cancel at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease and this Company shall have the right, on like notice, to cancel this agreement."

Counsel's theory, as evidenced by the complaint, is that regardless of whether the premium was paid or not by the mortgagor, the policy was still valid because of the failure of the company to notify the mortgagee of cancellation as required by this condition. It was alleged in Paragraph VIII of the complaint that no notice of cancellation was mailed, delivered or served upon this plaintiff; that plaintiff had no knowledge of any kind of cancellation, if any, made as to the said R. A. Reynolds and C. A. Reynolds, and plaintiff alleges no cancellation of any kind was made on said R. A. Reynolds and C. A. Reynolds.

Condition III requires that if the company exercises the right to cancel, the policy shall continue in force for the mortgagee for ten days after notice to the mortgagee. The condition refers only to affirmative action by the company. In view of the allegation of the complaint that no cancellation was attempted as to either the mortgagor or the mortgagee, this condition was entirely inapplicable so far as the demurrer was concerned.

We submit, under the foregoing authorities, that the complaint did not state facts sufficient to constitute a cause of action and that the demurrer should have been sustained.

Assignments of Error I, II and III

These Assignments are as follows:

1. The court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. The said judgment is contrary to law.

3. The said judgment is contrary to the evidence.

These Assignments may be discussed together. All that has been said in support of the demurrer is applicable to them but is strengthened by the facts disclosed by the evidence.

The mortgage did not require the mortgagor to carry insurance for the benefit of the mortgagee, and the relationship between Mrs. Allen, the plaintiff and the Reynolds brothers, the mortgagors, with reference to insurance was created by an independent and separate contract.

Mrs. Allen left Idaho before the issuance of the insurance policy; had no dealings with the defendant company personally and any representations made to her as to the terms and conditions or as to the term of the insurance policy, were made by Mr. Reynolds.

It was alleged, and some evidence was offered to the effect that the parties understood the policy to be for five years instead of one. Mrs. Allen stated that Mr. Reynolds told her that he was taking out a five-year policy (Tr. 73). She did not talk to the agent of the Appellant company. She never saw the policy, (Tr. 66). Such information as she had was obtained from persons having no connection directly or indirectly with the appellant. Surely, the Appellant cannot be bound by statements made to her by persons having neither actual or implied authority to speak for it.

Mr. Reynolds is positive in his testimony, (Tr. 119), that he told Mrs. Allen that premiums were to be paid

annually. Mr. Reynolds paid two annual premiums (Defendant's Exhibits 4 and 5, Tr. 170), and was mailed a renewal certificate, (Defendant's Exhibits 20 and 21, Page 201). These certificates were issued by the Stamping Bureau of the State of Idaho under the authority of the Statute (Tr. 208, 209, Sections 6 and 7) and carried in large type the provision "Approved for One Year Only". The rate on the original policy was $1.63. On the first renewal $1.63, on the second renewal $1.30. How could a man accustomed to business, be misled into a belief that a policy was for five years when he knew the premium was payable annually; when his receipts specified that it was a renewal certificate and announced to bold type that it was approved for one year only and where the rate was changed from year to year. If, in fact, Mr. Reynolds did not know, he should have known as a reasonably intelligent man that the failure to renew the policy would terminate it, and what Mr. Reynolds knew, Mrs. Allen should have known. He was her sole source of information. He alone made all representations as to the policy.

The trial court in his memorandum decisions stressed that the policy used the expression "Does insure for a period of five years", (Tr. 48, but this agreement is specifically made dependant upon the consideration of the renewal of the policy by the payment of an annual premium. If the annual premium was not paid, the consideration failed and the policy expired. The appellant company was powerless to compel Reynolds or Mrs. Allen to continue the policy in force or to compel

the payment of the premium if the policy remained in force. After the rendition of the judgment herein (Tr. 49), and on July 22, 1928, the trial court on July 31, entered a corrected judgment granting the appellant credit for annual premiums of 1926 and 1927. This action was entirely inconsistent with his theory as expressed in the decision. If this was a five-year policy and continued to expiration in 1929 without further action by the assured, then the company was entitled to the premium for the entire period. If it was a contract for one year only, and expired in September of each year unless renewed, the company was entitled only to the annual premium due. The court in its supplemental judgment, (Tr. 50), recognized our theory of the case and gave credit accordingly.

The court, after a review of the evidence, was of the opinion that the policy had lapsed because of the neglect of the mortgagor to pay the annual premium and held that the mortgage clause relieved the mortgagee from the consequences of this neglect, but as we have already indicated, the neglect against which the mortgagee is protected is such that invalidates the policy. You can not invalidate something that is not in existence. The mortgage clause clearly contemplates an existing valid policy which would be effective but for some act or neglect of the mortgagor, not a policy that has by its terms expired.

For example, the policy provides, (Tr. 19), that it shall be void if the building becomes vacant or unoccupied and so remains for ten days. Many mortgagees do

not reside in the district where the property is situated, are not in a position to see that this and similar provisions of the policy are complied with. For this reason, insurance companies have protected mortgagees against invalidating of the policy as to its interests by providing that the policy shall not be invalid as to such mortgagee because of the violation of its terms in such particulars by a mortgagor. The mortgagor has right of possession. In most instances, is in actual possession, and is therefore, in a position to see that the terms and conditions of the policy are complied with, but the mortgagee and mortgagor are in identically the same position so far as knowledge of the expiration date is concerned.

Suppose this policy, with the mortgage clause attached, had been issued for three years and required the payment of the premium upon the issuance of the policy. Suppose the mortgagor was under agreement to keep the property insured but had failed to renew the policy at the expiration date. Would the company be liable because of this act or neglect on part of the mortgagor? Why should a different rule pertain when the policy is for one year with the privilege of renewal by the payment of an annual premium? The only act or neglect on the part of Mr. Reynolds was the failure to renew the policy at the expiration date. Mrs. Allen is just as responsible for this neglect as was Mr. Reynolds. As was well said in *Hoskin v. Hurwitz,* 208 N. Y. S. 40:

> "Defendant did not obligate himself to advise plaintiff of the expiration date of the policy, nor

> was it the defendant's duty, either under the allegations of the complaint or as a matter of law, to advise plaintiff that the policy expired at any particular time." Fries v. Breslin, 176 Fed. 76, 99 C. C. A. 38, S. C. 215, U. S. 609, 30 S. Ct. 410, 54 Led. 347. The terms of the policy were always within the knowledge of the plaintiff and if he failed to remember that the policy expired at a certain time before the fire, it was his own negligence and not the defendant's which prevented plaintiff from renewing the policy."

Mr. Reynolds had agreed to keep the property insured (Tr. 68). The insurance company was not a party to this agreement; had no knowledge of it; it was not incorporated in the mortgage, so the Appellant is chargeable with neither actual or constructive notice of the agreement. It was Mrs. Allen's duty to protect her own interests and see that Mr. Reynolds performed his agreement. The mortgage was executed in 1919. From that date until 1926 he did keep the property insured. A period of seven years. She further required that the policy be deposited for safe keeping in her own safe deposit box. This was done until 1924, at least according to her own testimony (Tr. 69). In 1927 (Tr. 70) the Reynolds were behind in the interest on the notes and she was forced to travel from California to Idaho to straighten matters out. She went to the safe deposit box; she knew that Reynolds was in financial difficulty and was not keeping other agreements; was in a position to learn whether he was keeping the agreements as to the insurance. At that time the policy had expired and had already been sur-

rendered. It was because of her neglect that the building was without insurance when destroyed in August, 1928. Had she not returned to Idaho in 1927, she might be entitled to more consideration, but she was on the ground with notice that Reynolds was delinquent in his legal duties and could have, by the slightest effort, ascertained the truth with reference to her insurance. Why blame the insurance company? We had tried to retain the business; had endeavored to persuade Reynolds to renew the policy, but were informed over his own signature that he had placed the insurance elsewhere. We had no reason to doubt his statements and were justified in assuming that everybody's interests had been protected by the new policy.

The district court held that we should have notified Mrs. Allen under the mortgage clause of the cancellation. There was no cancellation. There was a surrender of the policy on an expiration date by the only person with whom the company had dealt in connection with the policy. We did not terminate the policy by cancellation, we fought to retain the business. The local agent wanted it. He frankly admitted that the premium was attractive to him. He lost the business to a competitor and so informed the company and the records kept in the usual course of business show the policy as lost business, not as a cancellation. (Defendant's Exhibit 21). The local agent was so anxious to retain the business that he actually enclosed in his lettel to Mr. Reynolds, the renewal certificate and called attention to the fact that there was a slight reduction

in the premium, (Exhibit 22, Tr. 203). The letter was returned with the notation "This policy has been placed with the Hardware Mutual", the note being initialed by R. A. Reynolds. Where, then, in the record is there any support to the contention that the company cancelled the policy. If Mr. Reynolds had simply neglected the matter, or if he had informed the agent that he intended to let all insurance lapse, perhaps the duty of the company would have been different, but he specifically stated that the policy had been placed elsewhere and the agent had every reason to believe that all interests were fully protected by the new policy.

The trial court held that we should have demanded the premium from Mrs. Allen under the provisions of the mortgage clause, but that provision has no application here. Where the policy is issued in consideration of the agreement to pay a specified sum for the insurance for a definite period the provision would apply, but here no premium was due. Neither Mr. Reynolds nor Mrs. Allen was obligated to renew the policy or to pay the premium necessary to continue the policy in force during the year beginning September 20, 1926. This policy had expired at noon of that day. The duty of the company was no greater than is imposed upon it at the expiration date of any other policy. There was no legal duty to renew upon which a demand for the premium could be predicated. The mortgage clause requires a demand only where the mortgagor neglects to pay. We sought to obtain a new contract covering the year 1927

and failed. Until the minds of the parties had met and agreed that the policy should be renewed, no premium was due. The policy simply expired and terminated with no duty imposed upon us to continue it in force after its expiration date.

Assignment IX.

This assignment is in the following language:

> "Because the evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent, with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellatiion to the agent of the defendant, and the uncontradicted evidence shows that R. A. Reynolds, the agent of the plaintiff, surrendered the policy in question to defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company."

If it should be held that the policy had not expired, and that the company would be liable to the mortgagee because of the provisions of the mortgage clause, then in the alternative we contend that the liability of the company ceased because of the surrender of the policy and the termination thereof by consent, through the acts of C. A. Reynolds, acting as agent for Mrs. Allen, within the scope of his apparent authority.

There is some dispute in the record as how the policy got into the hands of the local agent, but it is clear that the policy was surrendered to the company in October, 1926, nearly two years before the fire occured. It is the respondent's theory, supported by testimony

of two vitally interested witnesses, Mr. Reynolds and Mrs. Allen, that the policy was issued and left in the possession of Mr. Anderson who was then the local agent with instructions to deliver the policy to the First National Bank of Filer for deposit in the safe deposit box of Mrs. Allen. That Mr. Anderson failed to follow these instructions; kept the policy in his possession and delivered it to Mr. Graves when he sold the business. That Mr. Graves retained it until October, 1926, at which time, without the knowledge of either Mrs. Allen or Mr. Reynolds, he marked the policy cancelled and mailed it to the Home Office.

The Appellant's theory, likewise supported by testimony, is that the policy, upon execution, was delivered to Mr. Reynolds; retained by him until October, 1926, at which time he surrendered the policy to Mr. Graves because he had placed the business with the Hardware Mutual. What the real facts are is immaterial.

Either Mrs. Allen or Mr. Reynolds was entitled to the policy under arrangement between themselves. By custom the policy is placed in the hands of the mortgagee. If neither obtained the policy, they were guilty of extreme neglect for which they alone are responsible. If it was the arrangement that the policy should be placed in Mrs. Allen's custody in her safe deposit box, she was guilty of extreme negligence in not discovering its absence when she was in Idaho in 1927 and prior to the fire, especially in view of the fact that she made the trip because of Mr. Reynolds delinquencies with reference to the loan protected by the policy.

If Mr. Reynolds was the agent of Mrs. Allen, and acting within the scope of his apparent authority, agreed to the surrender of the policy, it makes little if any difference whether the policy was in his possession or that of Mr. Graves. The important question is; his authority to surrender or to authorize the surrender of the policy? There is no doubt of what Mr. Reynolds intended to do. He was mailed a renewal certificate for the policy. The policy was indentified clearly as covering the garage and roof garden at Filer, and Mr. Reynolds noted thereon that the business had been placed in the Hardware Mutual. But one conclusion is possible and that is that Mr. Reynolds intended that the policy should terminate, and if he was acting within his apparent authority, Mr. Graves was justified in sending the policy in if it were in his possession or in going to Twin Falls and getting the policy from Mr. Reynolds as he testified he did.

The whole matter hinges upon the agency of Mr. Reynolds and its scope. The mortgage did not obligate either Mr. R. A. Reynolds or his brother to carry insurance (Plaintiff's Exhibit 1, Tr. 153). His agency, if any, was created by an independent agreement. Mrs. Allen testified that the agreement was that "Mr. Reynolds was to carry insurance for my security," (Tr. 65). "At all times there was to be $10,000 insurance policy carried, with mortgagee clause attached, in my interest." (Tr. 68). That she was leaving the question of insurance to Mr. Reynolds. (Tr. 86). This statement being qualified upon re-direct examination that she did not authorize Mr. Reynolds to cancel any

policy, (Tr. 87). Mr. Reynolds' testimony is; (Tr. 60). "I had an agreement with Mrs. Allen that I would carry $10,000 insurance at all times upon the building at least."

The appellant is not concerned with whether Mr. Reynolds failed in his duty to Mrs. Allen. She may have a cause of action against him for his neglect in not keeping the property insured. The vital question is: Was he acting within the scope of his apparent authority in allowing the policy to terminate, or in surrendering it and replacing the insurance elsewhere? The policy provides:

> "This policy shall be cancelled at any time at the request of the insured." (Tr. 20).

Mrs. Allen could exercise this right personally or through an agent, subject to the limitations that he must act within the scope of his apparent authority. It is also apparent that a policy may be cancelled by mutual consent and that such consent may be given by an agent if acting within the scope of his apparent authority. This phase of the litigation is governed by the principles of ostensible agency or authority or power:

> "Ostensible authority to act as an agent may be conferred if the party to be charged as principal, affirmatively or intentionally through the lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." Peterson v. Kuhi, 193 N. W. 756, 110 Neb. 372:

> "Ostensible powers of an agent are his real powers as to persons dealing with him without

knowledge of limitations on his apparent authority." Rugg v. Johnson, 140 N. E. 816, 246 Mass, 229:

> "The essential inquiry is not what authority the defendant intended to confer, but what authority a reasonable person in such position could naturally suppose he had conferred." Federal Insurance Co. v. Sydeman, 136A, 137 (N. H. 1927).

The agreement between Mrs. Allen and Mr. Reynolds with reference to insurance was made in 1919. From that time Mr. Reynolds had entire control as to the placing of insurance. He selected the companies, at least four policies were secured before 1924. These were placed in Mrs. Allen's safe deposit box, (Tr. 62). He selected the appellant company at the solicitation of the appellant's local agent, (Tr. 63). His control over insurance was more apparent because it is common knowledge that insurance is generally controlled by the mortgagee. He made the initial payment; paid the first annual premium; when the renewal was solicited by Mr. Graves, he again asserted his control and in writing notified the agent that he had placed the insurance elsewhere. He was not in the insurance business, either as an agent or a broker. Apparently he had absolute control, as far as the insurance was concerned, and had exercised that control continuously for seven years. The agent had persuaded him to switch the insurance from another company to the appellant and had no reason to doubt his authority to transfer the insurance from the appellant to the Hardware Mutual.

When Mrs. Allen was pressed to answer why she had not checked her insurance in 1927, she was forced to commit herself.

> "Q. Why didn't you look in your box in 1927 to see whether this policy was there?
>
> A. I just never thought of looking that was all.
>
> Q. You were leaving that matter, the question of insurance, to Mr. Reynolds, as I understand it?
>
> A. Yes." (Tr. 86).

True, on further examination, directed by leading questions of her counsel, she stated that she did not authorize Mr. Reynolds to cancel insurance. (Tr. 87). This was a purely self-serving declaration. She had given Mr. Reynolds ostensible and apparent control over insurance matters for seven years and Mrs. Allen could not avoid the consequences of his act as her agent by a mere denial of his authority.

It must be conceded that mere authority to place insurance does not along carry with it the authority to cancel. It is needless to review the innumberable Authorities on this point. In most of them the agent soliciting the business endeavored to cancel, in practically all of them but one policy for one term was involved. In a few we find a course of action extending over a period of years or a relationship which the courts have held constituted an authority to cancel as well as to place. In 26 C. J. 137, Page 160, we find the following rule:

> "Where, however, a property owner constitutes

> the agent of fire insurance companies or a broker to keep the property insured and empowers him to select the insurer, the agent has power to cancel the policies without notice to the insured and to substitute therefore a policy of another company and that is especially true where the agent or broker of the assured is not the agent of the insuring company. An agent with authority to keep property insured, has the right to cancel one and substitute another policy."

Hollywood Lumber Co. v. Dubuque, etc. West Virginia, 1927, 92 S. E. 858: *Kooistria v. Rockford Insurance Company*, 81 (North Western) N. W. 569: *Arnfield v. Guardian Insurance Co.*, 34 A. 580: *May v. Hartford Insurance Company*, 297 F. 999.

> "A general agent with power to insure property and to keep it insured, may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company." *Ferrai v. Western Insurance Company*, 30 Cal. App. 493, 159 Pac. 609. In the case of *Kooistria vs. Rockford Insurance Co.*, 81 N. W. 568." 122 Mich. 627, it is said:

> "She (the plaintiff) left the policy in the hands of her agent and thus placed it in his power to mislead the defendant who acted in good faith in cancelling the policy. If Mr. Lathrop failed to notify the plaintiff, this is no fault of the defendant. By leaving the policy with her agent, she placed it in his power to mislead the defendant. If both parties are innocent, it was her act which has misled and she must be the sufferer."

If Mr. Reynolds was not the agent of Mrs. Allen, whom did he represent? He had no connection with the appellant company? He placed insurance with us.

What reason did we have to question his authority to withdraw it? He notified the appellant that he had placed the insurance elsewhere; was acting within the scope of his apparent authority as the agent for Mrs. Allen and the appellant was fully justified in assuming that the policy had been permitted to terminate and expire with the full knowledge and consent of Mrs. Allen. She allowed the matter to drift for two years without investigation. Neglected her insurance until a loss occurred. If she has suffered a loss it is due to her own carelessness in the selection of her agent and in failing where opportunity was presented to discover that her agent had violated his agreement to keep her property insured.

Assignment of Error VIII

Because, under the pleadings, contract of insurance and evidence, the defendant was entitled to a declaration of law as follows:

> "The court declares the law to be under the pleadings, the contract of insurance and the evidence in this case, the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

Judgment was entered in the cause on the 2nd day of July, 1929, (Tr. 136). On July 11, 1929, the defendant moved that special findings be made by the court and filed an affidavit of James R. Bothwell, one of the attorneys in the case, in support of said motion to the effect that it had been his intention to request special

findings in the brief which had been submitted to the court, but that said request had inadvertantly been omitted from the brief, (Tr. 138). Counsel immediately filed objection to this motion for special findings and on the 22nd day of July, 1929, the court denied defendant's motion for special findings, (Tr. 141). On July 30, 1929, the defendant made a request in writing that;

> "The court declares the law to be under the pleadings, the contract of insurance and the evidence in this case, the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

A copy of this request was served upon counsel. They forthwith filed objection to the request. On July 30, 1929, the court formally denied the request, (Tr. 145) to which exception was taking in writing (Tr. 144).

In *Utah Mines & Smelting Company v. Beaver Company,* 262 U. S. 325, 43 S. ct. 577, 67 L. ed. 1004. it was said:

> "The plaintiff has submitted a motion to dismiss the writ of error." Of this we first dispose. The ground of the motion is that the case was tried by the court without a jury; that no exception was taken during the trial and no requests for special finding, or a declaration of law, made during the progress of the trial; that the court gave its decision and a general finding orally and directed judgment for the defendant which was duly entered; that nearly three months later, on motion of plaintiff and against defendant's objection, the court made and filed special findings of fact. The defendant challenges the power of the court to

make these special findings and insists that they should be disregarded, in which event, nothing substantial is left for review. All of the proceedings, including special findings, happened at the same term. The rule is that during the term the record is "In the breast of the Court," and may be altered during that time as the interests of justice require.

Goddard v. Ordway (Phillip v. Ordway) 101 U. S. 745-752; 25 L. Ed. 1040143; Ayres v. Wiswall, 112 U. S. 187-190, 28 L. Ed. 693-4; Dolph v. Tyack, 14 How. 297-312, 14 L. Ed. 428-435; Dowell v. Tilton, 119 U. S. 637-643, 30 L. Ed. 511; Bassett v. United States, 9 Wall. 38, 41 L. Ed. 548-9.

In *McCandless v. Haskins* et al., Eighth Circuit, 28 F. 2nd, 693, it is said:

"After the judgment assailed had been entered, the plaintiff filed a request for a declaration of law to the effect that on the uncontradicted evidence as the same appeared from the pleadings and evidence, the plaintiff was entitled to a recovery." The court entertained this application and on due consideration, denied the same. This is now urged by the plaintiff in error as against this defendant, contending the same was final after judgment, hence came too late and therefore cannot be considered by this court. In this contention, we think defendants in error are wrong. See Utah Mines v. Beaver, 262 U. S. 325, 43 S. ct. 577, L. Ed. 1004; Commonwealth Casualty Company v. Aitchner, 18 Fed. 2nd 879, a decision of this court, both cases holding that during the term at which a judgment order or decree is entitled, the same is "in the breast of the court."

In *Muentzler v. Los Angeles Trust & Savings Bank,*

3 F. 2nd 222, a decision from the Seventh Circuit, the opinion being written by Judge Evans, it is said:

> "Neither findings nor request for findings were made. There appears to have been no motion made by either party at the close of the evidence. Under the rule announced in Raymer v. Netherwood Supra, this would be fatal to the defendant's rights to consider the evidence, and we would be limited merely to an examination of the pleadings and the judgment. The sufficiency of the former to support the latter not being a matter of legitimate dispute in this case. The decision in the Raymer v. Netherwood case was rendered without our attention having been called to Section 269 of the Judicial Code as amended by the Act of February 26, 1919, Comp. St. Ann. Supp. 1919, Paragraph 1249. This section was intended to and did govern the disposition of cases on appeal whether civil or criminal, legal or equitable, and applies to all actions at law including those wherein the jury is waived. We see no persuasive reason why this remedial section should not apply to common law actions tried by the judge without a jury.
>
> Waivers of jury trials usually occur where the facts are particularly free from controversy and in cases like the present where the real controversy is one of law. Such waivers lessen expense to the litigants and to the Government and expedite the trial of cases and should not be discouraged.
>
> In the present case it appears that the court was fully apprised of the facts that the defendant denied any and all liability. There was no question of the amount of liability, if any existed, nor of the bank organization, its by-laws, etc., nor was there any dispute in reference to the fact that Jenkins who sent the telegram extending the Film Company credit was Vice-President and Director of the defendant. * * * *

These and other facts being conceded, plaintiff asserted and defendant denied liability. Each party sought a judgment. Plaintiff for the amount alleged in its declaration and the defendant for a dismissal of the action. It may be somewhat careless to omit to prepare and file former motions, just as it is sometimes an oversight to fail to except the rulings in those courts (fortunately not very numerous) where exceptions are not allowed as a matter of course. But what is the purpose of a formal motion or an exception? It is to apprise the court of the litigants' position that it may, in furtherance of justice, correct such ruling if convinced of its error. Where both parties have fully and fairly presented the evidence as here and argued the questions of law fully, it seems particularly appropriate that Section 269 of the Judicial Code should be invoked to save the litigants from the consequence of an oversight by counsel.

Quite different is the situation where counsel do not make known their position or where (as in case of instructions to the jury) the court's attention is not directed to its failure to completely cover the issues or to a misstatement of law or fact.

Likewise an entirely different question is presented when on the trial a question is asked and without further objection the answer is given. Finding it unsatisfactory, objection is then made and the court is asked to strike out the answer. Generally speaking, such rulings cannot be assailed on appeal for want of objection or exception, but the line of demarkation between such cases and the present is clear. In the instant case the court was fully apprised of the litigants position and informed that counsel vigorously opposed an adverse ruling. In other cases, the court's attention was not called to its error and no opportunity was given to correct the oversight or mistake, nor was it informed that counsel felt aggreived at such ruling.

> Moreover, since the decision in Raymer v. Netherwood was announced, this court has held in Operators Piano Company v. First Wisconsin Trust Company, C. C. A. 283 Fed. 904; Kokomo Steel Wire Company v. Republic of France, C. C. A. 268 F. 917; Quarles v. City of Appleton, C. C. A. 299 F. 508, that an assignment of error challenging the sufficiency of the evidence to support any judgment may present a reviewable question of law. It follows that the decision in Raymer v. Netherwood Supra is overruled."

Under these decisions, the appellant is clearly entitled to a review of all matters covered in its assignments of errors and specifically to a review for the purpose of determining whether or not plaintiff was entitled under the pleadings, contract of insurance and evidence to recover against the defendant.

What we have said in the discussion of prior assignments of error may be considered in connection with the present assignment and without a repetition of either the arguments or authorities heretofore presented.

Other assignments of error are specific and have been covered in the discussion as to the sufficiency of the evidence to justify a recovery. We are insisting upon each of them, but believe it needless to repeat what has already been said.

Assignment of Error XII

The assignment itself gives our viewpoint and is as follows:

> "Because the uncontradicted evidence shows that the immediate cause of cancellation of the

> policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retained the policy in his possession and thereafter surrendered the policy to defendant's agent, with a statement in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have known that the policy was not, in fact, in the safety deposit box, and plaintiff knew at that time that the mortgagors were in default upon the mortgage and consequently plaintiff is estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent."

We respectfully submit that there was no liability upon the appellant company under its policy at the time this fire occured in August, 1928, and that the case should be remanded with instructions to dismiss.

If, however, it should be the opinion of the court that we are incorrect in our contentions, in any event, the judgment as entered should be modified. Condition 5 of the Mortgage Clause provides:

> "Whenever this company shall pay the mortgagee any sum for loss or damage under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, this company shall to the extent of such payment, be thereupon legally subrogated to all of the rights of the party to whom such payment shall be made, under all security held as collateral to the mortgage debt, and may, at its option, pay to the mortgagee the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a

full assignment and transfer of the mortgage and of all other security; but no subrogation shall impair the right of the mortgagee to recover the full amount of the claim."

Assignment of Error XVIV deals with this provision and reads:

"The court erred in ordering judgment entered in favor of the plaintiff and against defendant without containing a provision to the effect that upon payment of said judgment to the mortgagee, the defendant shall, to the extent of such payment, be subrogated to all the rights of the mortgagee, and that the defendant shall receive a full assignment and transfer of the mortgage and all other securities held by the plaintiff as provided in condition 5 of the Mortgage Clause attached to the insurance policy in question." (Tr. 225).

The Reynolds Brothers, as mortgagors, clearly had no claim against the appellant under the policy, and no liability as to them existed. Mr. Reynolds, without any possibility of a doubt, permitted the policy to expire and surrendered it or authorized its surrender to the appellant company and its agent. The mortgagee bases her sole right to recover upon the provisions of the mortgage clause. Since she relies upon the mortgage clause, and should the court sustain her right of recovery, the appellant company is clearly entitled to every protection afforded it by the mortgage clause, and the main consideration for the agreement made in the mortgage clause is the subrogation rights provided for in condition 5. The appellant is very positive in its contention that there is no liability under all of the circumstances to either the mortgagor or to the mort-

gagee. The mortgagors in reality, admitted that they had no claim under the policy because they did not file a proof of loss and neither did they join in the suit as a parties plaintiff. This being true, should the court sustain the mortgagee's right to recovery, it should extend to the company the protection afforded by condition 5 and provide in the judgment that the mortgagee shall, upon the payment of the judgment, comply with the provisions of the condition.

Respectfully submitted,

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